

State of Maine
DEPARTMENT OF ATTORNEY GENERAL
MEMORANDUM

TO: Bob Hartley, BAQC, DEP
FROM: Sarah Roberts Walton, Assistant Attorney General
DATE: April 2.7, 1995
RE: Confidentiality Requests & Public Access to License Applications

Federal law requires that the State permitting program include legal authority to make available to the public any permit application, compliance plan (including the schedule of compliance), permit, and monitoring and compliance certification report except for trade secret information entitled to confidential treatment pursuant to CAA § 114(c). The confidential treatment provision of CAA § 114(c) places the burden of proof on the person seeking confidential treatment of certain records, reports or information obtained by the permitting authority. CAA § 114(c).

If the person to make a satisfactory showing that the

records, reports, or information, or particular part thereof, (other than emission data) to which the Administrator has access under this section if made public, would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18 of the Unites States Code, except that such record, report, or information may be disclosed to other officers, employees, or authorized representatives of the Unites States concerned with carrying out this Act or when relevant in any proceeding under this Act.

CAA § 114(c). State law provides authority to make available to the public any permit application, compliance plan, permit, and monitoring and compliance certification report, except for information entitled to confidential treatment.

All information and data submitted in license application and at the request of DEP shall be available for public disclosure. See DEP Regulations Chapter 115(IX)(B); 1 M.R.S.A. §§401-410. Any exception to this general rule shall be governed by the Maine Freedom of Access law. Id. The Maine Freedom of Access Law is intended to be liberally construed to promote the underlying purpose of allowing public inspection of public records. See 1 M.R.S.A. § 401. “Public records” as defined by 1 M.R.S.A. §402(3) as:

any written, printed or graphic matter or matter or any mechanical or electronic data compilation from which information can be obtained,... that is in the possession or custody of an agency or public official of this State... and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business.

Limited exceptions to the definition of public record as defined in 1 M.R.S.A. §402(3)(A)-(I). The exception most likely to be asserted in the context of air emission license applications is 1 M.R.S.A. §402(3)(B):

Records that would be within the scope of a privilege against discovery or use as evidence recognized by the courts of this State in civil or criminal trials if the records or inspection thereof were sought in the course of a court proceeding.

1 M.R.S.A. §402(3)(B).

In order to obtain confidential treatment for documents asserted to come within the exception in 1 M.R.S.A. §402(3)(B), the source must make a sufficient showing to DEP that the material that source has requested DEP treat as confidential has “independent economic value, actual or potential” to its competition and are “the subject of efforts that are reasonable under the circumstances to maintain its secrecy”: as required by 1 M.R.S.A. §402(3), Me.R.Evid. 507, and 10 M.R.S.A. §1542(4)(A) and (B).

Rule 507 of the Maine Rules of Evidence creates the following privilege concerning trade secrets:

A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

Me.R.Evid.507.

10 M.R.S.A. § 1542(4)(A) & (B) define “trade secret” as

information, including, but not limited to, a formula, pattern, compilation, program, device, method, technique or process, that:

- A. Derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
- B. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

10 M.R.S.A. § 1542(4)(A) & (B).

Under no circumstances shall the following be treated as confidential:

1) information concerning the nature and extent of the emissions of any air contaminant by a source; and 2) information submitted by the source with respect to the economic, environmental and energy impacts of various control options in the determination of the control technology requirements. See DEP Regulations Chapter 115(IX)(B).